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The Constitutionality of Power of Sale Foreclosures by Federal Government Entities

*AgriBank FCB v. Cross Timbers Ranch*¹

I. INTRODUCTION

When loaning money, lenders often require that obligations be secured by a mortgage on real estate owned by the borrowers.² In Missouri, the prevailing form of mortgage is the deed of trust³ with a power of sale⁴ provision.⁵ Upon default,⁶ the trustee is allowed to sell the property without a judicial hearing⁷ and

1. 919 S.W.2d 263 (Mo. Ct. App. 1996).

2. See generally GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.1 (3d ed. 1994).

There are many variations on a mortgage, but all involve the debtor, or mortgagor, giving the creditor, or mortgagee, an interest in the land which can be exercised if the mortgagor fails to repay the debt. *Id.* Generally, the debtor and creditor will execute a promissory note for the debt amount, and a mortgage on land as security for the debt. *Id.*

3. A deed of trust is an alternative to a traditional mortgage which “normally involves a conveyance of the realty to a third person in trust to hold as security for the payment of the debt to the lender-note holder whose role is analogous to that of the mortgagee.” NELSON & WHITMAN, *supra* note 2, § 1.6.

4. Upon default, a power of sale authorizes the mortgagee or a third party to sell the property at a public sale after varying amounts of notice. NELSON & WHITMAN, *supra* note 2, § 7.19. This method is allowed in over thirty jurisdictions. NELSON & WHITMAN, *supra* note 2, § 7.19 n.1.

5. MO. REV. STAT. §§ 443.290-443.410 (1994). For text and discussion of specific sections, see *infra* notes 7-8.

6. Default has been defined as “the omission or failure to . . . observe a promise or discharge an obligation . . .” *Bradbury v. Thomas*, 27 P.2d 402, 405 (Cal. Ct. App. 1933).

Default is often defined by the promissory note itself. If it is not defined in the note, however, the plain meaning is used. See, e.g., *Derry Finance N.V. v. Christiana Companies, Inc.*, 797 F.2d 1210, 1213-14 (3d Cir. 1986) (plain meaning used instead of contextual interpretation because recourse note was plain on face); *Chrysler Credit Corp. v. B.J.M., Jr., Inc.*, 834 F. Supp. 813, 831 (E.D. Pa. 1993) (since not defined in Article 9 of the U.C.C., “default” given its plain meaning).

7. The statute provides that the trustee may foreclose and sell the property pursuant to a valid power of sale provision in the mortgage or deed of trust, and does not require any hearing or other determination of the rights of the parties. MO. REV. STAT. § 443.290 (1994).

The foreclosure sale may be carried out in as few as twenty days, depending on the

after giving only limited notice.⁸ Because of the limited notice and opportunity to be heard required under the Missouri statute, which is similar to other states' power of sale statutes,⁹ borrowers often raise the issue of whether the statute violates the due process required under the Fifth¹⁰ or Fourteenth¹¹ Amendments to the United States Constitution.

The constitutionality of nonjudicial power of sale foreclosures is well settled as applied to private lenders because of the lack of state or federal action.¹² The question becomes more difficult, however, when the lender is the federal government or a corporation formed by the federal government.¹³

notice requirements for the particular county, and the mortgagor's only recourse is to pay the entire amount due prior to the sale, or pay the amount due within a statutorily prescribed redemption period following the sale. MO. REV. STAT. § 443.410 (1994).

8. The notice section of the statute provides:

The notice required by section 443.310 shall . . . be given by advertisement, inserted for at least twenty times, and continued to the day of the sale, in some daily newspaper, in counties having cities of fifty thousand inhabitants or more, and in all other counties such notice shall be given by advertisement in some weekly newspaper published in such county for four successive issues

MO. REV. STAT. § 443.320 (1994).

This statute has been in existence in Missouri, in essentially its present form, since 1885 with only minor changes relating to the population of the town within the county. In 1989, the section was rewritten, but the general notice requirement has not materially changed.

In addition to the publication requirements, the statute provides for individual notice by certified or registered mail, not less than 20 days before the sale, as follows:

- (1) To each person whose name and address is set forth in any such request recorded at least forty days prior to the scheduled date of sale; and
- (2) To the person shown by the records in the office of the recorder of deeds to be the owner of the property as of forty days prior to the scheduled date of foreclosure sale at the foreclosing mortgagee's last known address for said record owner; and
- (3) To the mortgagor or grantor named in the deed of trust or mortgage at the foreclosing mortgagee's last known address for said mortgagor or grantor.

MO. REV. STAT. § 443.325 (1994).

The statute does not require that the individual to whom notice is to be sent actually receive the notice, however, as long as an attempt is made to get notice to him.

9. Over thirty jurisdictions offer some form of power of sale foreclosure. NELSON & WHITMAN, *supra* note 2, § 7.19 n.1.

10. "No person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

11. "No state shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1, cl. 2.

12. See *infra* notes 52-66 and accompanying text.

13. Federal governmentally-formed corporations include the Federal National

To date, courts have rarely addressed the issues raised when the government forecloses on a mortgage, primarily by failing to find sufficient federal action to raise a constitutional issue.¹⁴ On the few occasions that courts have found sufficient federal government action, however, they have found that state power of sale statutes lack the due process required under the Constitution.¹⁵

While many governmentally-created lenders have escaped constitutional scrutiny by not being considered federal actors, there is a potential argument, based upon a recent decision by the United States Supreme Court,¹⁶ that the actions of at least some of those protected lenders should be considered federal actions.¹⁷ To that end, the present case provides an opportunity to discuss the constitutional issues raised and the results the courts facing this issue have reached, while exploring a possible new approach to finding federal action.

II. FACTS & HOLDING

Allison Brothers, Inc., which later became Cross Timbers Ranch (hereinafter "Cross Timbers"),¹⁸ together with William E. Allison and Mallie A. Allison, in their personal capacity, executed a \$500,000 promissory note in 1978 to the Federal Land Bank of St. Louis, which later became AgriBank, FCB (hereinafter "AgriBank").¹⁹ A deed of trust on 3,736 acres of property in Hickory County, Missouri, secured the note.²⁰ In the case of a default, the deed of trust contained a power of sale provision.²¹

Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), and the Farm Credit Banks (FCB), among others. These corporations will be discussed in detail *infra*, notes 67-117 and accompanying text.

This question also exists when a state government forecloses a mortgage through its various agencies. Many of the same issues would arise with state government lenders. For the purposes of this Note, however, the discussion will focus on federal government lenders.

14. See *infra* Part III.B.

15. See *infra* Part III.B.

16. *Lebron v. National R.R. Passengers Corp.*, 115 S. Ct. 961 (1995).

17. See *infra* Part III.C.

18. The record is not clear on the reasons for the change in name; however, the name change was not an issue in the appeal.

19. *AgriBank FCB v. Cross Timbers Ranch, Inc.*, 919 S.W.2d 263, 265 (Mo. Ct. App. 1996).

20. *Id.*

21. *Id.*

After Cross Timbers suffered financial problems, the note went into default.²² AgriBank offered to restructure the loan in February 1992;²³ however, AgriBank limited the time for acceptance to March 1992.²⁴ Cross Timbers did not file an application for restructuring during the time period set by AgriBank.²⁵

On May 21, 1992, one day prior to the date set for the original foreclosure sale, Cross Timbers filed for bankruptcy under Chapter 12 of the Bankruptcy Code,²⁶ in the United States Bankruptcy Court for the Western District of Missouri.²⁷ On February 11, 1993, the bankruptcy court granted AgriBank relief from the automatic stay²⁸ and AgriBank began foreclosure proceedings²⁹ under the power of sale clause in the deed of trust.³⁰

On February 16, 1993, Cross Timbers applied for restructuring with AgriBank.³¹ AgriBank rejected the application because of the ongoing foreclosure proceedings.³²

Cross Timbers then appealed the relief from the stay to the United States District Court for the Western District of Missouri.³³ On March 9, 1993, however, the bankruptcy court dismissed Cross Timbers' bankruptcy proceedings under Chapter 12 because of Cross Timbers' failure "to obtain

22. *Id.* at 266.

23. The statute requires an offer to restructure for farm credit banks pursuant to their charter from the federal government:

Not later than 45 days before any qualified lender begins foreclosure proceedings with respect to a loan outstanding to any borrower, the lender shall notify the borrower that the loan may be suitable for restructuring and that the lender will review any such suitable loan for restructuring

12 U.S.C. § 2202a(b)(2) (1994).

24. *AgriBank FCB*, 919 S.W.2d at 266.

25. *Id.*

26. 11 U.S.C. §§ 1201-1231 (1994). Chapter 12 bankruptcy provides a specific opportunity for restructuring debts to family farmers.

27. *AgriBank FCB*, 919 S.W.2d at 266.

28. 11 U.S.C. § 362(a)(4), (d) (1994). An automatic stay is allowed on all proceedings regarding the property of a debtor to allow the bankruptcy trustee time to develop a plan for disposition of debts.

29. Most states recognize either power of sale foreclosure, which does not require any type of hearing, or judicial foreclosure, which requires a determination of the parties' rights through a court proceeding. See generally NELSON & WHITMAN, *supra* note 2, §§ 7.11-7.30. Missouri allows both procedures and outlines the minimum requirements for a power of sale foreclosure by statute. MO. REV. STAT. §§ 443.290-443.410 (1994).

30. *AgriBank FCB*, 919 S.W.2d at 266.

31. *Id.*

32. *Id.*

33. *Id.*

confirmation of a reorganization plan.³⁴ This dismissal ended Cross Timbers' appeal from the earlier relief from the stay.³⁵

On the day the foreclosure sale was to occur, Cross Timbers again filed for bankruptcy, this time under Chapter 11.³⁶ The trustee proceeded with the sale, even after notice of the bankruptcy was given to the trustee, and sold the property to AgriBank for \$675,000.³⁷ AgriBank asked the bankruptcy court to approve the foreclosure sale in order to finalize the sale.³⁸ The bankruptcy court approved the entire sale, and on June 16, 1993, the trustee's deed was recorded conveying title to AgriBank.³⁹

In November 1993, Cross Timbers filed a complaint in the United States District Court for the Western District of Missouri, seeking an order that AgriBank sell the property to Cross Timbers for the value of the property set by the bankruptcy court in the Chapter 12 proceeding.⁴⁰ The United States district court denied the relief, and the Eighth Circuit Court of Appeals affirmed.⁴¹

34. *Id.*

35. *Id.* at 266 n.3.

36. *Id.* at 266. While Chapter 12 proceedings are available only for family farmers, Chapter 11 bankruptcy proceedings are available for corporate debtors as a method of reorganization. 11 U.S.C. §§ 1101-1174 (1994).

37. *AgriBank FCB*, 919 S.W.2d at 266. It is a common occurrence for the holder of the note to also be the buyer at the foreclosure sale. NELSON & WHITMAN, *supra* note 2, § 7.21.

Many other issues arise because of this common occurrence, particularly if the property is sold for less than its fair market value, which would give the lender the debt owed and a gain when the property is re-sold by the lender. This is potentially a bigger issue because borrowers are often liable for any amount still due under the mortgage that was not covered by the foreclosure sale price; therefore, the lender could get the property for less than its value and still be able to sue the borrower for any deficiency. NELSON & WHITMAN, *supra* note 2, § 8.1.

38. *AgriBank FCB*, 919 S.W.2d at 266.

39. *Id.* Normally, completing a foreclosure sale prior to the bankruptcy court relieving the creditor from the stay will render the title passed by the sale void, and possibly subject the mortgagee to damages and contempt of court. NELSON & WHITMAN, *supra* note 2, § 8.12. The Southern District Court of Appeals did not state the reason for the bankruptcy court's decision in its opinion.

40. *AgriBank FCB*, 919 S.W.2d at 266. The bankruptcy court set the property's value at \$522,000.00. *Id.* Cross Timbers was claiming that it had a "right of first refusal" as the former owner of a property which had been foreclosed by a federal lending agency." *Id.* (citing 12 U.S.C.A. § 2219a(a) (1994)).

Cross Timbers also asked the court to review a decision by the Farm Credit Administration, which did not allow Cross Timbers to stop AgriBank from selling the property to a third party under the same provision. *Id.*

41. *Id.*

In May 1994, AgriBank petitioned the Circuit Court in Hickory County, Missouri, for an injunction to prevent Cross Timbers and the Allisons from harvesting and selling crops growing on the property.⁴² In response, Cross Timbers filed a four-count counterclaim.⁴³ Cross Timbers' counterclaim was for a declaratory judgement:

(1) that it had been deprived of its property without due process of law in a nonjudicial foreclosure and praying for cancellation of the trustee's deed; (2) for wrongful foreclosure; (3) for specific performance of the statutory obligation of AgriBank to sell the property to Cross Timbers for the fair market value of \$522,000.00; and (4) for compensatory and punitive damages.⁴⁴

AgriBank moved for summary judgment on the counterclaims, and the trial court granted its motion.⁴⁵ The Missouri Court of Appeals for the Southern District affirmed the judgment.⁴⁶

In its opinion, the Missouri Court of Appeals for the Southern District addressed the issue of whether AgriBank violated the Fifth⁴⁷ or Fourteenth⁴⁸ Amendments to the Constitution by using the Missouri nonjudicial power of sale foreclosure statute.⁴⁹ The court of appeals held that a power of sale foreclosure by a federal government entity, under a valid contractual provision, does not violate the Constitution.⁵⁰ The court further held that, although AgriBank is a federally chartered government instrumentality, AgriBank is still not considered a federal government actor for Fifth Amendment purposes.⁵¹

42. *Id.*

43. *Id.*

44. *Id.* at 267.

45. *Id.*

46. *Id.* at 273.

47. *See supra* note 10.

48. *See supra* note 11.

49. *AgriBank FCB*, 919 S.W.2d at 268.

50. *Id.*

51. *Id.* at 269.

III. LEGAL BACKGROUND

A. Power of Sale as State Action

The Missouri power of sale statute⁵² has been challenged as unconstitutional on its face on several occasions and has always been found to be constitutional.⁵³ Mortgagors argue that the power of sale statute violates procedural due process under the Fourteenth Amendment to the United States Constitution.⁵⁴ The specific problems that are challenged are the limited notice procedures⁵⁵ and the lack of an opportunity to be heard.⁵⁶

Before a court may determine if the statute provides sufficient notice and opportunity to be heard, however, the court must determine if the statute itself provides sufficient state action to require constitutional scrutiny.⁵⁷ The presence of state action is a constitutional prerequisite to a due process violation and courts have used a variety of tests to determine if state action exists.⁵⁸

The two primary Missouri cases addressing the existence of state action are *Federal National Mortgage Association v. Howlett*,⁵⁹ and *Federal National Mortgage Association v. Scott*.⁶⁰ In *Howlett*, the Missouri Supreme Court determined that state action is not implicated by Missouri's power of sale statute

52. MO. REV. STAT. §§ 443.290-443.410 (1994). For text and discussion of specific sections, see *supra* notes 7-8.

53. Courts have determined that the statute is constitutional and involves no state action as it is written and utilized by lenders. Additional problems arise when the lender foreclosing the mortgage is a state or federal actor. These problems are discussed *infra* Part III.B.

54. See *supra* note 11.

55. See *infra* note 102.

56. See *infra* note 114.

57. NELSON & WHITMAN, *supra* note 2, § 7.27.

58. Among these tests, five are most often used: direct state action, encouragement, governmental function, judicial enforcement, and pervasiveness. NELSON & WHITMAN, *supra* note 2, § 7.27. See also Daniel K. Barklage, *Constitutional Law—Mortgages—Extrajudicial Mortgage Foreclosure Not State Action*, 41 MO. L. REV. 278, 278-81 (1976).

For the purposes of this Note, it is sufficient to note that these arguments have not been effective in Missouri to find state action inherent in the power of sale statute.

Additionally, courts could find state action if a state actor conducts the foreclosure sale. NELSON & WHITMAN, *supra* note 2, § 7.27. This generally occurs when the county sheriff is called upon to conduct the sale because of the inability of the trustee to conduct the sale. In Missouri, this is a statutory alternative when the trustee is unwilling or unable to conduct the sale. MO. REV. STAT. § 443.340 (1994).

59. 521 S.W.2d 428 (Mo. 1975).

60. 548 S.W.2d 545 (Mo. 1977).

because the power of sale is a contractual right established between the parties by the deed of trust held on the land.⁶¹ Therefore, the Missouri Supreme Court held that the statute merely sets forth the minimum requirements for enforcing the private contractual right and does not amount to state action implicating the due process clause.⁶²

In *Scott*, the Missouri Supreme Court addressed the same issues previously raised in *Howlett*.⁶³ In addition, the court considered the issue of whether the foreclosing entity, the Federal National Mortgage Association (FNMA), was subject to the constraints of the Fifth Amendment of the United States Constitution because of FNMA's status as a federal government entity.⁶⁴ The Missouri Supreme Court again applied the *Howlett* reasoning and held that the foreclosure "was pursuant to power expressly granted by [the deed of trust] and not to any power authorized or encouraged under state law."⁶⁵ In addition, the court held that FNMA was "not a federal instrumentality and that its action in foreclosing the deed of trust was not federal action, but was the action of a private individual."⁶⁶

Therefore, the Missouri power of sale statute, even when utilized by a federal government entity, can safely be said not to implicate state action for Fourteenth Amendment purposes.

B. Power of Sale as Federal Government Action

Primarily for public policy reasons, the federal government has established many of its own lenders.⁶⁷ These governmentally-created lenders and mortgage

61. *Howlett*, 521 S.W.2d at 432. See, e.g., *Abrams v. Lakewood Park Cemetery Ass'n*, 196 S.W.2d 278 (Mo. 1946); *Adams v. Boyd*, 58 S.W.2d 704 (Mo. 1933); *Kelsay v. Farmers' & Traders' Bank*, 65 S.W. 1007 (Mo. 1901); *Spires v. Lawless*, 493 S.W.2d 65 (Mo. Ct. App. 1973).

62. *Howlett*, 521 S.W.2d at 433. The court also indicated that "[u]nless the state law dictates the choice to be made by the party or in some way significantly interferes with the free exercise of that choice, the private conduct and state law are not subject to constitutional restraints under the fourteenth amendment." *Id.* at 436 (quoting William M. Burke & David J. Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 SO. CAL. L. REV. 1003, 1106 (1973)).

63. *Scott*, 548 S.W.2d at 548-49.

64. *Id.* at 549.

65. *Id.*

66. *Id.*

67. These lenders, such as the Government National Mortgage Association (GNMA), the Federal National Mortgage Association (FNMA), and the Federal Home Loan Mortgage Corporation (FHLMC) generally work in areas that the federal government thought would benefit from government involvement. Congress formed GNMA and FNMA with the intent to "provide stability in the secondary market for

holders often must foreclose on the property on which they hold mortgages.⁶⁸ When these mortgages include a power of sale clause, the governmentally created lenders will foreclose using the power of sale statute of the state in which the mortgage was created.⁶⁹

By utilizing a power of sale clause, these governmentally-created lenders are often challenged as violating the Due Process Clause of the Fifth Amendment to the United States Constitution⁷⁰ based upon their status as federal government actors.⁷¹ For ease of analysis, these entities can be divided into three categories: direct instrumentalities, federally-owned corporations, and federally-chartered corporations.

Direct instrumentalities of the federal government include such governmental agencies as the Veterans Administration (VA), the Farmers Home Administration (FmHA), and the Federal Housing Administration (FHA). These agencies share the common trait of direct control by the federal government.⁷²

residential mortgages . . . [and] promote access to mortgage credit throughout the nation . . .” 12 U.S.C. § 1716 (1994).

The purpose behind FHLMC was essentially the same as for FNMA. Act of Oct. 28, 1992, Pub. L. No. 102-550, § 1382(a), 106 Stat. 3672, 4002 (1992). *See generally* NELSON & WHITMAN, *supra* note 2, § 11.

68. NELSON & WHITMAN, *supra* note 2, § 7.28.

69. The power of sale clause may be in a mortgage purchased by the lender or it may be in the form used by the lender. The standard form used by most governmentally created lenders includes a power of sale clause in the states which allow nonjudicial foreclosure. GRANT S. NELSON & DALE A. WHITMAN, *CASES AND MATERIALS ON REAL ESTATE TRANSFER, FINANCE AND DEVELOPMENT*, 1317-19 (4th ed. 1992).

In addition, the Multifamily Mortgage Foreclosure Act of 1981 allows power of sale foreclosure on certain properties held as security by the Secretary of Housing and Urban Development. 12 U.S.C. §§ 3701-3717 (1994). *See generally* NELSON & WHITMAN, *supra* note 2, § 7.19.

70. *See supra* note 10.

71. Essentially identical arguments can be used in regard to state-owned lenders when attempting to find a violation of the Fourteenth Amendment.

This same argument was discussed and rejected by the Missouri Supreme Court in *Federal National Mortgage Association v. Scott*, 548 S.W.2d 545, 548-49 (Mo. 1977). *See supra* notes 63-66 and accompanying text.

72. These federal government agencies are part of the cabinet-level agencies, so their actions are actions of the federal government. The Veterans Administration, now Department of Veterans Affairs, is controlled by the Secretary of Veterans Affairs. 38 U.S.C. § 301 (1994). The Farmers Home Administration is under the direction of the Department of Agriculture. 7 U.S.C. § 1981 (1994). The Federal Housing Administration is under the direction of the Federal Housing Commissioner, who is an Assistant Secretary of Housing and Urban Development. 42 U.S.C. § 3533 (1994).

Courts have found these and similar agencies to be federal government actors for Fifth Amendment due process purposes.⁷³

The courts have reached different conclusions as to federal action, however, when the entity is a federally-owned or federally-chartered corporation. Federally-owned corporations include lenders such as the Government National Mortgage Association (GNMA), as well as other corporations that may incidentally hold and foreclose a mortgage such as the Federal Deposit Insurance Corporation (FDIC), which often forecloses on mortgages held by failed banks.⁷⁴

Courts have split with regard to Fifth Amendment requirements of federally-owned corporations. A federal district court has found the FDIC to be the federal government for Fifth Amendment purposes when foreclosing mortgages.⁷⁵

Other federally-owned corporations, however, have not been treated as the federal government for Fifth Amendment purposes. Most notably, the Eighth Circuit held that the GNMA was not the federal government for Fifth Amendment purposes when foreclosing a mortgage under the Missouri power of sale statute.⁷⁶ The court determined that GNMA was acting as a private corporation because there was not a "sufficiently close nexus between the

73. NELSON & WHITMAN, *supra* note 2, § 7.28. Instrumentalities such as the VA and FmHA, that make direct home loans to the individuals they serve, will often be required to foreclose on the mortgage. *Id.* In addition, the constitutionality of foreclosures by other direct government instrumentalities has been tested using due process standards. *See, e.g.,* Johnson v. United States Dep't of Agric., 734 F.2d 774 (11th Cir. 1984); Federal Deposit Ins. Corp. v. Morrison, 568 F. Supp. 1240 (N.D. Ala. 1983), *rev'd on other grounds*, 747 F.2d 610 (11th Cir. 1984), *reh'g denied*, 763 F.2d 419 (1985); Matzke v. Block, 564 F. Supp. 1157 (D. Kan. 1983), *aff'd in part, rev'd in part*, 732 F.2d 799 (10th Cir. 1984); Ricker v. United States, 434 F. Supp. 1251 (D. Me. 1976); United States v. Ford, 551 F. Supp. 1101 (N.D. Miss. 1982); Rau v. Cavanaugh, 500 F. Supp. 204 (D.S.D. 1980).

74. NELSON & WHITMAN, *supra* note 2, § 7.28.

75. *Morrison*, 568 F. Supp. at 1245. In *Morrison*, the Federal District Court for the Northern District of Alabama determined that the FDIC was the same as the federal government for purposes of Fifth Amendment due process. *Morrison*, 568 F. Supp. at 1246.

It is interesting to note that the district court in *Morrison* originally seemed to decide the issue by declaring that the actions under the Alabama statute were governed by a Fourteenth Amendment state action analysis. *Id.* at 1244-45. Less than two weeks later, however, the court issued an addendum to its opinion which declared that the correct reasoning for its opinion was under the Fifth Amendment because the FDIC was a federal agency and that the Fourteenth Amendment analysis should be considered dicta. *Id.* at 1246. The court then stated that "[t]he broader issue shall await another day, another case, and perhaps another court." *Id.*

76. *Warren v. Government Nat'l Mortgage Ass'n*, 611 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 847 (1980).

government regulations and the challenged activity specifically at issue so that the challenged activity itself may be fairly treated as truly that of the federal government directly.⁷⁷

Federally chartered corporations that hold mortgages include many of the lenders that the government has set up to serve specific needs. While all of the federally chartered corporations were started by the federal government, they are all established as private corporations with essentially the same rights and protections that private corporations enjoy.⁷⁸ In addition, many of the federally chartered corporations also enjoy special status, such as exemption from taxes⁷⁹ and original jurisdiction in federal courts.⁸⁰ In addition, the government retains the right to change the corporations and the statutes that control them.⁸¹

Among these federally chartered lenders are the Federal National Mortgage Association,⁸² the Federal Land Banks (now Farm Credit Banks or FCBs),⁸³ and the Federal Home Loan Mortgage Corporation (FHLMC).⁸⁴

FNMA was established to serve the secondary mortgage market.⁸⁵ While originally federally-owned, FNMA was restructured in 1968 as a private

77. *Id.* at 1234.

78. Congress gave all three federally-chartered corporations discussed in the text the general power to perform many essential corporate functions. The powers are set forth at: 12 U.S.C. § 2013 (1994) (Farm Credit Banks); 12 U.S.C. § 1452(c) (1994) (Federal Home Loan Mortgage Corporation); and 12 U.S.C. § 1723a(a) (1994) (Federal National Mortgage Association).

79. All three corporations discussed are exempt from “Federal, State, municipal, and local taxation” under federal statute. Farm Credit Banks’ exemption is in 12 U.S.C. § 2023 (1994), the Federal Home Loan Mortgage Corporation exemption is in 12 U.S.C. § 1452(e) (1994), and the Federal National Mortgage Association exemption is in 12 U.S.C. § 1723a(c) (1994).

80. FHLMC is given original jurisdiction under 28 U.S.C. §§ 1345, 1442, which provide for original jurisdiction in the district courts of the United States for officers and agencies of the United States. 12 U.S.C. § 1452(f) (1994).

81. In fact, in 1987, the section of the United States Code that establishes the Federal Land Bank (FLB) system was restructured in an effort to save the Federal Land Bank system. The change in the statute allowed the merger of the FLB and the Federal Intermediate Credit Bank within each Federal Land Bank region. The resulting bank after the merger would be a Farm Credit Bank (FCB). It was the result of one of these mergers that formed the bank in the case at issue, AgriBank FCB.

82. 12 U.S.C. § 1717 (1994).

83. 12 U.S.C. § 2011 (1994).

84. 12 U.S.C. § 1452 (1994).

85. The secondary mortgage markets entities are able to buy outstanding mortgages from local lending institutions to allow the local institutions to lend the money to a different borrower. FNMA and FHMLC were both established to service this secondary mortgage market. *See generally* NELSON & WHITMAN, *supra* note 2, § 11.3.

corporation traded on the open market.⁸⁶ FNMA is now owned entirely by the private sector,⁸⁷ but the board of directors is partially appointed by the President of the United States.⁸⁸

On several occasions, actions by FNMA have been determined not to be actions by the federal government for Fifth Amendment purposes.⁸⁹ In *Northrip v. Federal National Mortgage Association*, the Sixth Circuit Court of Appeals determined that FNMA's actions in foreclosing a mortgage were not federal government actions under the Fifth Amendment because, even though there is some government involvement in FNMA's activities, "there is not a 'sufficiently close nexus' between the state and the challenged act of foreclosure."⁹⁰ In *Federal National Mortgage Association v. Scott*,⁹¹ the Missouri Supreme Court held that the actions of FNMA in foreclosing the deed of trust were the same as actions of a private individual.⁹²

The Farm Credit Bank system was started by the federal government and a federal statute controls the actions of the banks;⁹³ however, the farmers that the banks serve now own the banks.⁹⁴ The banks do enjoy many special advantages of being closely connected with the government, including an exemption from taxation.⁹⁵ The Farm Credit Banks have also not been found to be the federal government for Fifth Amendment purposes.⁹⁶

The Federal Home Loan Mortgage Corporation (FHLMC) is similar to FNMA in that it buys mortgages on the secondary market.⁹⁷ The FHLMC was established in 1970 with the purpose of serving the secondary market for both

86. In 1968, Congress changed the status of FNMA to a private corporation whose sole purpose was to buy and sell mortgages in the secondary mortgage market. 12 U.S.C. § 1717 (1994). The change resulted by splitting FNMA into FNMA and the Government National Mortgage Association (GNMA). *Id.* See generally NELSON & WHITMAN, *supra* note 2, § 11.3.

87. 12 U.S.C. § 1718 (1994).

88. Five of fifteen directors are appointed by the President with no consent of the Senate required. 12 U.S.C. § 1723a(b) (1994).

89. *Northrip v. Federal Nat'l Mortgage Ass'n*, 527 F.2d 23, 30-31 (6th Cir. 1975); *Federal Nat'l Mortgage Ass'n v. Scott*, 548 S.W.2d 545, 549 (Mo. 1977).

90. *Northrip*, 527 F.2d at 30-33.

91. 548 S.W.2d 545 (Mo. 1977).

92. *Id.* at 549. For a more complete discussion, see *supra* notes 63-66 and accompanying text.

93. 12 U.S.C. § 2011 (1994).

94. 12 U.S.C. § 2011 (1994); *DeLaigle v. Federal Land Bank of Columbia*, 568 F. Supp. 1432, 1439 (S.D. Ga. 1983).

95. 12 U.S.C. § 2023 (1994).

96. *DeLaigle*, 568 F. Supp. at 1439; *AgriBank FCB v. Cross Timbers Ranch*, 919 S.W.2d 263, 269 (Mo. Ct. App. 1996).

97. See *supra* note 85.

federally insured and conventional mortgages.⁹⁸ After several changes in 1992,⁹⁹ the stock is now owned by the public and is freely transferable,¹⁰⁰ and the President of the United States appoints five of the eighteen directors.¹⁰¹ The actions of FHLMC also have not been found to be federal government action for Fifth Amendment purposes.

On the few occasions when courts have determined that federal action existed, courts have determined that the power of sale statutes are constitutionally deficient in both the notice and opportunity to be heard requirements.¹⁰² Courts thus far have allowed the government lenders to use the statutory power of sale foreclosure process, provided they make the changes in their policies that are necessary to remedy the due process problems.¹⁰³

To cure the limited notice defects, the court in *Ricker v. United States*¹⁰⁴ required the Farmers Home Administration to comply with the constitutional standard for notice set forth in *Mullane v. Central Hanover Bank*,¹⁰⁵ when foreclosing a mortgage using the Maine power of sale statute.¹⁰⁶

Interestingly, while the court in *Federal Deposit Insurance Corporation v. Morrison*¹⁰⁷ found federal action, it held that the limited notice in the Alabama statute did not violate Morrison's due process rights because it was a contractual provision.¹⁰⁸ The court determined that the mortgagor's rights under Alabama law only existed until the mortgagee exercised the power of sale, therefore it "is impossible that this foreclosure infringed on [mortgagor's] right."¹⁰⁹ No other

98. NELSON & WHITMAN, *supra* note 2, § 7.28.

99. Act of Oct. 28, 1992, Pub. L. No. 102-550, § 1382(a), 106 Stat. 3672, 4002 (1992).

100. 12 U.S.C. § 1453(a) (1994).

101. 12 U.S.C. § 1452(a)(2)(A) (1994).

102. *See, e.g.*, *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (notice by advertisement was not constitutionally sufficient); *Federal Deposit Ins. Corp. v. Morrison*, 568 F. Supp. 1240 (N.D. Ala. 1983), *rev'd on other grounds*, 747 F.2d 610 (11th Cir. 1984) (promissory note, which did not include provision for notice to mortgagor, was not constitutionally sufficient). *See generally* NELSON & WHITMAN, *supra* note 2, §§ 7.24-7.25. For additional cases, see *infra* note 114.

103. *See* NELSON & WHITMAN, *supra* note 2, § 7.25. *See also* *United States v. Ford*, 551 F. Supp. 1101 (N.D. Miss. 1982) (FmHA administrative hearing procedure sufficient to supplement state power of sale statute).

104. 417 F. Supp. 133 (D. Me. 1976).

105. 339 U.S. 306 (1950). The Supreme Court in *Mullane* required notice "reasonably calculated . . . to apprise interested parties . . ." *Id.* at 314.

106. *Ricker*, 417 F. Supp. at 138.

107. 747 F.2d 610 (11th Cir. 1984), *reh'g denied*, 763 F.2d 419 (11th Cir.), *cert. denied*, 474 U.S. 1019 (1985).

108. *Id.* at 615.

109. *Id.*

court has followed this reasoning, and the reasoning has been attacked directly by the Fifth Circuit.¹¹⁰

Several courts have held that providing constitutionally sufficient notice in excess of the notice required by the power of sale statutes could cure the due process defects inherent in the statutes.¹¹¹ The United States Supreme Court has held in a non-mortgage context, however, that if the notice is not directed by the statute it cannot be corrected by supplying greater notice.¹¹² This holding has not yet been extended to the mortgage context; thus, for the present, lenders should safely be able to cure defects by providing notice consistent with *Mullane*.¹¹³

The lack of an opportunity to be heard has been addressed by several courts that have held power of sale statutes to be deficient.¹¹⁴ *Ricker* addressed the lack of an opportunity to be heard and determined that the Fifth Amendment requires "a hearing at which [mortgagors] could challenge both the legal right of the [mortgagee] to foreclose and the propriety of the decision to do so."¹¹⁵ To cure the lack of a hearing, the court in *United States v. Ford*¹¹⁶ allowed the Farmers Home Administration to use an administrative appeals process.¹¹⁷

110. *Davis Oil Co. v. Mills*, 873 F.2d 774, 786 (5th Cir. 1989).

111. See, e.g., *Laughlin v. Walters*, 718 F.2d 513, 515 (1st Cir. 1983); *United Companies Fin. Corp. v. Mellon Fin. Serv. Corp.* No. 7, 922 F.2d 270, 271 (5th Cir. 1991); *Fitzgerald v. Cleland*, 498 F. Supp. 341, 349 (D. Me. 1980), *aff'd in part, vacated in part* 650 F.2d 360 (1st Cir. 1981); *United States v. Ford*, 551 F. Supp. 1101 (N.D. Miss. 1982); *United States v. White*, 429 F. Supp. 1245, 1253 (N.D. Miss. 1977); *Production Credit Ass'n v. Williamson*, 755 P.2d 56, 58 (N.M. 1988).

But cf. *Lehner v. United States*, 685 F.2d 1187, 1190 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984).

112. *Wuchter v. Puzziotti*, 276 U.S. 13, 24 (1928).

113. See generally *NELSON & WHITMAN*, *supra* note 2, § 7.24.

114. See, e.g., *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976); *Garner v. Tri-State Dev. Co.*, 382 F. Supp. 377 (E.D. Mich. 1974); *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594 (E. D. Mich. 1974), *rev'd on other grounds*, 527 F.2d 23 (6th Cir. 1975); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D. N.C. 1975); *Valley Dev. at Vail v. Warder*, 557 P.2d 1180 (Co. 1976). See generally *NELSON & WHITMAN*, *supra* note 2, § 7.25.

115. *Ricker*, 417 F. Supp. at 139.

116. 551 F. Supp. 1101 (N.D. Miss. 1982).

117. *Id.* at 1105.

C. New Developments: Federal Government Corporations as Federal Actors

Since the infancy of the United States, the federal government has established many private corporations.¹¹⁸ The first private corporation established was the Bank of the United States,¹¹⁹ and the federal government has been establishing private corporations to achieve the goals of the federal government ever since that time.¹²⁰ As with the mortgage lenders discussed above, courts have declared that many other similar federal government corporations are not the federal government for constitutional purposes.¹²¹

In 1995, however, the United States Supreme Court broadened the definition of what constitutes a federal actor. In *Lebron v. National Railroad Passenger Corporation*,¹²² Justice Scalia, in an 8-1 majority opinion held that Amtrak was a federal government actor for First Amendment purposes.¹²³ *Lebron* involved an artist who rented billboard space in Penn Station from

118. The power of the federal government to form corporations comes from the Necessary and Proper Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 18. A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 551.

119. *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 968 (1995). Congress created the Bank of the United States by the Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (1791). *Lebron*, 115 S. Ct. at 968.

120. Froomkin, *supra* note 118, at 557-59. The list of federal government corporations includes, among others, the United State Enrichment Corporation, the Corporation for National and Community Service (AmeriCorps), the Legal Services Corporation, the Tennessee Valley Authority, the National Endowment for Democracy, the Commodity Credit Corporation, and the Student Loan Marketing Association (Sallie Mae). Froomkin, *supra* note 118, at 546, 550.

121. Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 306 (1995); *see, e.g.*, *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987) (Conrail is not a state actor because it is a corporation.); *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 204-05 (7th Cir. 1984) (Amtrak is not a state actor because of its corporate form.); *Network Project v. Corporation for Pub. Broad.*, 4 Media L. Rep. (BNA) 2399, 2403-08 (D.D.C. 1979) (Corporation for Public Broadcasting is not a state actor.).

122. 115 S. Ct. 961 (1995).

123. *Id.* Justice Scalia stated:

We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. at 974-75.

Amtrak,¹²⁴ only to have Amtrak rescind the contract after reviewing the proposed billboard.¹²⁵ Lebron sued Amtrak for violating his First Amendment rights.¹²⁶

The district court held that Amtrak was a government actor and granted Lebron an injunction.¹²⁷ The Second Circuit reversed the district court¹²⁸ and held that Amtrak was not a federal government actor for First Amendment purposes.¹²⁹ The United States Supreme Court accepted certiorari on the case,¹³⁰ reversed the court of appeals holding on federal action, and remanded for a determination of the First Amendment claim.¹³¹

In *Lebron*, the Supreme Court established a two-prong test for determining if a federal government corporation is a federal government actor for purposes of evaluating federal action. The first prong considers the extent to which the corporation was formed for the furtherance of governmental objectives, which Amtrak satisfied based upon the purpose given by Congress in the legislation that created Amtrak.¹³² The second prong involves the extent to which the federal government retains control over the corporation's efforts to achieve its objectives, which Amtrak satisfied because of the structure of its board of directors.¹³³

124. *Id.* at 963. Lebron was a creator of billboards that involved public commentary. *Id.* In this particular case, he had rented a particularly large billboard in Penn Station in New York City. *Id.* The proposed billboard was a commentary on the Coors family, of the Coors brewing company, and their involvement with right-wing political causes. *Id.* at 964.

125. The vice president of Amtrak disapproved of the advertisement and rejected the proposed advertisement using the policy of the former owner of Penn Station, which Amtrak inherited when it purchased the property, "that it will not allow political advertising on the [S]pectacular sign." *Id.* at 964.

126. *Id.*

127. *Id.*

128. *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388 (2d Cir. 1993).

129. The court of appeals held that Amtrak was not a government entity because the legislation creating Amtrak specifically said that it was not. *Id.* at 390. The Court also held that the federal government was not "so involved in Amtrak that the latter's decisions could be considered federal action." *Id.* at 391-92.

130. 511 U.S. 1105 (1994).

131. *Lebanon v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 975 (1995).

132. *Id.* at 974. Congress established Amtrak in 1970 "in order to avert the threatened extinction of passenger trains in the United States." *Id.* at 967. The act which established Amtrak stated that "'the public convenience and necessity require the continuance and improvement' of railroad passenger service." *Id.* (citing Rail Passenger Service Act of 1970, § 101, 84 Stat. 1328 (1970)).

133. *Id.* Six of the eight directors not named by the board itself are appointed by the President of the United States. *Id.* at 973. The court also noted that "it is established and organized under federal law . . . under the direction and control of federal government appointees." *Id.* at 974.

Following the Supreme Court's decision in *Lebron*, several courts have further defined the requirements for a finding of federal action by a federal government corporation.¹³⁴ The Ninth Circuit, in *American Bankers Mortgage Corporation v. Federal Home Loan Mortgage Corporation*,¹³⁵ applied the *Lebron* test in a Fifth Amendment due process analysis.¹³⁶ The court held that while FHLMC qualified under the governmental objectives prong of the *Lebron* test,¹³⁷ it failed the governmental control prong of the test.¹³⁸ FHLMC failed the "control" prong because "[t]he current governance structure of Freddie Mac affords the government far less control over that corporation's operations than it had over Amtrak's operations in *Lebron*."¹³⁹ Specifically, the court pointed to the fact that the government appoints fewer than one-third of the FHLMC directors, and that the FHLMC has issued much more stock than Amtrak.¹⁴⁰

In a later case, the Ninth Circuit utilized the *Lebron* analysis to determine if the American National Red Cross (hereinafter "Red Cross") qualified as an instrumentality of the United States government under the Religious Freedom Restoration Act.¹⁴¹ The court determined that the Red Cross was not a governmental actor under the *Lebron* test.¹⁴² The Ninth Circuit, under what it now refers to as a "structural" analysis or "government entity" test, held that the Red Cross satisfied the first prong of the *Lebron* test.¹⁴³ The court held,

134. *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401 (9th Cir.), *cert. denied*, 117 S. Ct. 58 (1996); *Hall v. American Nat'l Red Cross*, 86 F.3d 919 (9th Cir.), *cert. denied*, 117 S. Ct. 516 (1996); *Clark v. County of Placer*, 923 F. Supp. 1278 (E.D. Cal. 1996).

135. 75 F.3d 1401 (9th Cir. 1996). *American Bankers* involved a mortgage banking corporation that had been servicing mortgages for FHLMC. *Id.* at 1404. After an audit found that American Bankers Mortgage Corporation (ABM) had failed to comply with FHLMC's requirements, FHLMC terminated its relationship with ABM. *Id.* at 1405. Following this termination, ABM sued FHLMC alleging a violation of its Fifth Amendment due process rights and several other state law claims. *Id.*

136. *Id.* at 1406.

137. *Id.* at 1406-07.

138. *Id.* at 1407-09.

139. *Id.* at 1408.

140. *Id.* at 1407.

141. *Hall v. American Nat'l Red Cross*, 86 F.3d 919 (9th Cir. 1996).

142. *Id.* at 921-22. *Hall* involved a challenge to an action by the Red Cross denying Hall certification as a HIV/AIDS instructor because of his inability to "separate his religious convictions from his Red Cross duties." *Id.* at 920. *Hall* sued under the Religious Freedom Restoration Act, which allows suit against "a branch, department, agency, instrumentality, and official . . . of the United States . . ." *Id.* at 920-21 (citing 42 U.S.C. § 2000bb-2 (1994)). The act did not define "instrumentality," so the court was trying to determine if the Red Cross qualified by using the *Lebron* test.

143. *Hall*, 86 F.3d at 921. The Red Cross began as a private corporation, but was

however, that the Red Cross failed the second prong because “the government has not retained permanent authority to appoint the majority of the Red Cross governing board.”¹⁴⁴

The *Lebron* test was extended again in *Clark v. County of Placer*.¹⁴⁵ In *Clark*, the district court examined a civil rights claim under 42 U.S.C. § 1983, which arose against the Placer County Fair Association (PCFA)¹⁴⁶ after a female race car driver was discriminated against at the race track.¹⁴⁷ The PCFA satisfied the first prong of the *Lebron* test because of statutory requirements that the profits be used for maintenance of public property.¹⁴⁸ The second prong, while more difficult, was also satisfied because of the control the county exerts over the PCFA.¹⁴⁹ Interestingly, the extent of control of financial matters made up for the fact that none of the directors were appointed by the county.¹⁵⁰ The court also noted that policy concerns should resolve “close questions of this nature in favor of a finding of state action.”¹⁵¹

The *Lebron* test, however, has yet to be applied to an actual power of sale foreclosure by a federal government corporation. The readiness of the courts to extend the test to new situations, however, foreshadows a willingness to utilize the test in foreclosure situations.

IV. INSTANT DECISION

In the instant case, the Missouri Court of Appeals for the Southern District determined that the Fifth Amendment due process rights of Cross Timbers were not violated.¹⁵² First, the court determined that the statute itself did not violate

reorganized by the government to serve what were seen as important governmental objectives. *Id.*

144. *Hall*, 86 F.3d at 922.

145. 923 F. Supp. 1278 (E.D. Cal. 1996).

146. *Id.* at 1280. The PCFA was created to run the county fairgrounds, which are on land owned by the county. *Id.* California statutes require that the county of Placer control the PCFA budget and that the county succeed the PCFA if it was to dissolve. *Id.* at 1281. In addition, the county requires that it approve all contracts for racing events. *Id.*

147. *Id.* at 1281.

148. *Id.* at 1284.

149. *Id.* The court determined that the restriction on PCFA’s autonomy, combined with the county oversight over financial matters of the corporation was enough control to satisfy the second prong. *Id.*

150. *Id.*

151. *Id.*

152. *AgriBank FCB v. Cross Timbers Ranch, Inc.*, 919 S.W. 2d 263, 269 (Mo. Ct. App. 1996).

Cross Timbers' due process rights under the Fourteenth Amendment.¹⁵³ The court held that the parties had the right to enter into a contract that specified power of sale foreclosure as the remedy and that exercising the power of sale during foreclosure is not "principally derived from statute nor otherwise granted by the state."¹⁵⁴

The court further noted that wholly-owned federal entities do not implicate Fifth Amendment protections when they take advantage of the Missouri statutes.¹⁵⁵ Additionally, the court stated that AgriBank is a Farm Credit Bank,¹⁵⁶ and may not be an agent of the federal government for purposes of the Fifth Amendment.¹⁵⁷ Further, the court stated that AgriBank's status was not important because the foreclosure involved the power of sale provision of a deed of trust that is valid under Missouri law and there is no requirement for a hearing before a foreclosure sale.¹⁵⁸

Therefore, the court concluded that there was no violation of Cross Timbers' due process rights because the statute did not implicate state action under the Fourteenth Amendment,¹⁵⁹ AgriBank was not sufficiently connected to the federal government for a violation of the Fifth Amendment,¹⁶⁰ and even if it had been a federal actor, the foreclosure was a valid exercise of the Missouri power of sale statute and was therefore constitutional.¹⁶¹

V. COMMENT

Because of the nature of Farm Credit Banks,¹⁶² the Southern District Court of Appeals' decision in this case is probably correct. The rationale behind its holding, however, may no longer be valid.

153. *Id.* at 268.

154. *Id.* at 268. Additionally, the fact that the parties may use the courts to enforce their respective rights does not "involve significant governmental activity" that would implicate constitutional rights. *Id.*

155. *Id.* (citing *Warren v. Government Nat'l Mortgage Ass'n*, 611 F.2d 1229, 1232 (8th Cir. 1980)). The court noted that there must be a "sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [government] itself." *Id.*

156. For a discussion, see *supra* notes 93-96 and accompanying text.

157. *AgriBank FCB*, 919 S.W.2d at 269 (citing *Hill v. Farm Credit Bank*, 726 F. Supp. 1201, 1208 (E.D. Mo. 1989)).

158. *Id.*

159. *Id.* at 268.

160. *Id.*

161. *Id.* at 269.

162. See *supra* notes 93-96 and accompanying text.

It seems apparent from the Supreme Court's holding in *Lebron* that the issue of the constitutionality of nonjudicial foreclosures by federal government corporations is less clear today than ever before. If courts are willing to expand the holding in *Lebron* to other constitutional rights, as they appear ready to do,¹⁶³ it is only a matter of time before the courts are forced to apply the analysis to federal government lenders. Applying this new test, which is arguably broader than prior tests, could certainly change the treatment of a large number of borrowers in the mortgage market.

The two-part test in *Lebron*¹⁶⁴ could potentially bring many government lenders under the auspices of federal government action for Fifth Amendment purposes. This test is a distinct departure from the "nexus" test that was followed in *Cross Timbers*,¹⁶⁵ *Warren*,¹⁶⁶ and *Northrip*.¹⁶⁷ The *Lebron* test has little to do with the activity in question and, instead, is concerned with the relationship of the corporation to the government.

Farm Credit Banks, such as AgriBank, would almost certainly not be considered federal actors under the *Lebron* analysis. This is particularly likely in light of the Ninth Circuit decision in *American Bankers*,¹⁶⁸ which held that FHLMC failed the second prong of the test.¹⁶⁹ The first prong, furtherance of governmental objectives, should be satisfied based on the language of the statute that establishes the Farm Credit Banks.¹⁷⁰

The second prong is decidedly more difficult. The structure of Farm Credit Banks, being owned by the farmers they serve and with no directors appointed by the federal government, is almost certainly not enough control to satisfy the

163. See *supra* notes 135-51 and accompanying text.

164. See *supra* notes 132-33 and accompanying text.

165. *AgriBank FCB*, 919 S.W.2d at 268.

166. *Warren v. Government Nat'l Mortgage Ass'n*, 611 F.2d 1229, 1232 (8th Cir. 1980).

167. *Northrip v. Federal Nat'l Mortgage Ass'n*, 527 F.2d 23, 30-31 (6th Cir. 1975).

168. *American Bankers Mortgage Gov't Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401 (9th Cir. 1996). For a discussion of *American Bankers*, see *supra* notes 135-40 and accompanying text.

169. *Id.* at 1407-09.

170. The statute creating the Farm Credit System states:

(a) It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be *designed to accomplish the objective of improving the income and well-being of American farmers and ranchers* by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

12 U.S.C. § 2001(a) (1994) (emphasis added).

Lebron test. For that reason, as will be the case with many federal government corporations, Farm Credit Banks will probably not be considered federal actors for Fifth Amendment purposes.

This reasoning should also hold for FNMA and FHLMC. Both FNMA and FHLMC will satisfy the first prong of the test, because they were both formed by the government to further governmental objectives.¹⁷¹ The second prong, however, is probably not met by either FNMA or FHLMC. FNMA is entirely owned by the private sector¹⁷² and has only a minority of directors appointed by the government.¹⁷³ FHLMC is also owned by the private sector¹⁷⁴ and also has only a minority of directors appointed by the government.¹⁷⁵ In addition, FHLMC has already been held not to satisfy the *Lebron* test in *American Bankers*.¹⁷⁶

That does not mean, however, that other governmentally chartered lenders will escape the constitutional requirements as easily. The Government National Mortgage Association, for example, may now be subject to Fifth Amendment scrutiny where it had not been prior to *Lebron*.¹⁷⁷ GNMA's status as a wholly-owned governmental corporation,¹⁷⁸ like Amtrak and the Federal Deposit Insurance Corporation, makes GNMA a likely candidate for governmental actor status.

If the *Lebron* test were used to analyze the facts in *Warren*, for example, it is likely that the court would reach a different result. The first prong of the test would easily be satisfied by the declaration of purpose in the statute.¹⁷⁹

As for the second prong, when Congress partitioned GNMA and FNMA in 1968, GNMA stayed with the government when FNMA was established as a private corporation.¹⁸⁰ As part of the government, GNMA is controlled by the Secretary of Housing and Urban Development.¹⁸¹ Therefore, if the *Lebron* test

171. Both were formed to support the secondary mortgage market, thereby making more money available to lend to home buyers. See *supra* note 85 and accompanying text.

172. 12 U.S.C. § 1718(a) (1994).

173. Five out of eighteen directors are appointed by the President of the United States. 12 U.S.C. § 1723(b) (1994).

174. 12 U.S.C. § 1453 (1994).

175. 12 U.S.C. § 1452(a) (1994).

176. See *supra* notes 135-40 and accompanying text.

177. *Warren v. Government Nat'l Mortgage Ass'n*, 611 F.2d 1229, 1234 (8th Cir. 1980).

178. See 31 U.S.C. § 9101 (1994).

179. 12 U.S.C. § 1716 (1994). See *supra* note 67. GNMA and FNMA share the same statutory home, and therefore share the same statement of purpose.

180. 12 U.S.C. § 1716(b) (1994).

181. 12 U.S.C. § 1723(a) (1994). The Secretary of Housing and Urban Development has all of the power that a board of directors would have, such as the ability

is to be extended beyond the First Amendment,¹⁸² GNMA is certain to be considered a federal actor for Fifth Amendment purposes, thereby invalidating *Warren*.

This conclusion would raise many policy problems. Government lenders are generally either the lenders of last resort or exist to assist private lenders in making more loans to home buyers.¹⁸³

The added expenditures involved in an extended process of foreclosure may make the process too costly to justify the policy objectives of creating these lenders. If the government decides that these lenders are no longer cost-effective and elects to stop using them, its goal of providing access to home ownership will not be achieved. If government lenders are not in the secondary market buying mortgages and providing capital to lenders to make more loans, the availability of home loans will likely decrease.

The added foreclosure requirements will also provide a windfall to borrowers. When a borrower receives a loan from a private lender who is allowed to use nonjudicial foreclosure, the loan costs less than when the lender is required to go through the expense of a judicial foreclosure. When this same loan is purchased by a government lender, the borrower has the advantage of a judicial-foreclosure requirement without the added cost in the loan.

When acting as lenders of last resort, government lenders handle more mortgages likely to go into default than do private lenders.¹⁸⁴ If government lenders were required to go through the much longer process of judicial foreclosure, less credit-worthy borrowers would be allowed to retain their property longer than borrowers that were able to borrow using traditional lenders. This puts less credit-worthy borrowers in a better position and gives them more chances to stop the foreclosure process. On the other hand, perhaps this would help to achieve the goals of government lenders by giving these borrowers a better chance to remedy their financial problems.

Many of the ramifications, however, depend on what the courts require federal government lenders to do in an effort to remedy the due process problems inherent in most power of sale statutes. If courts continue to limit their holdings to requiring additional notice¹⁸⁵ and an administrative hearing,¹⁸⁶ the actual effect of the *Lebron* test could be negligible. If the courts refuse to allow government lenders to use any form of nonjudicial foreclosure, however, the

to adopt bylaws. *Id.* GNMA is run by a president, who is appointed by the President of the United States with the advice and consent of the Senate. *Id.*

182. As the court seemed willing to do, based upon the decisions in *American Bankers* and *Hall*. See *supra* notes 134-44 and accompanying text.

183. See *supra* note 67.

184. See generally NELSON & WHITMAN, *supra* note 2, § 11.3.

185. See *supra* notes 103-13.

186. See *supra* notes 114-17.

results could be devastating on the mortgage industry. Governmental lenders would be less able to operate in the secondary market, causing the cash flow in the primary mortgage market to slow.

VI. CONCLUSION

In its decision in *Cross Timbers*, the Missouri Court of Appeals for the Southern District continued to perpetuate the standard for finding federal action that was likely overruled by the United States Supreme Court in *Lebron*.

While the decision reached by the court of appeals is arguably the correct result, it seems clear that the decision was reached on the wrong grounds. The correct analysis for finding federal action by federal government corporations is now the *Lebron* standard. This represents a distinct change in the analysis used to determine federal government action for Fifth Amendment purposes and a probable change in the requirements to be employed by federal government corporations as they foreclose mortgages.

Whether added due process requirements are a change for the better is yet to be seen. So long as courts continue to allow federal government actors to cure defects in notice and hearing requirements by added regulation, the end result should not change policy to a great extent. If courts begin to require that federal government actors use judicial foreclosure, however, the results could be devastating to the mortgage industry.

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